IN THE

Supreme Court of the United States

October Term, 1971
No. .....

71-198

BURNS INTERNATIONAL SECURITY SERVICES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA and its AMALGAMATED LOCAL UNION NO. 162,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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BURNS INTERNATIONAL SECURITY SERVICES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, *et. al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner, Burns International Security Services, Inc., prays that a writ of certiorari issue to review a portion of the final Judgment of the United States Court of Appeals for the Second Circuit entered on April 26, 1971. Respondent, National Labor Relations Board (herein the "Board"), has filed a petition for a writ of certiorari,* which has not yet been acted upon, to review a different portion of said Judgment.

Opinions Below.

The court of appeals decision is not yet reported. The decisions of the Board and the trial examiner are reported at 182 NLRB No. 50. Copies of these de-

**NLRB v. The William J. Burns International Detective Agency, Inc.*, Docket No. 71-123 (filed July 23, 1971). After the court of appeals had rendered its decision, Petitioner changed its name to "Burns International Security Services, Inc." from "The William J. Burns International Detective Agency, Inc."

cisions appear herein as Appendices A, B and C, respectively.

Jurisdiction.

The Judgment of the court of appeals was entered on April 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) (1964). On July 17, 1971, Associate Justice John M. Harlan granted Petitioner's Motion For Extension Of Time until August 16, 1971, to file this Petition. See Appendix D attached hereto.

Questions Presented.

1. In an unfair labor practice proceeding alleging a refusal to bargain where the contention is made that the unit for bargaining is inappropriate, must either the Board, the trial examiner or the regional director articulate reasons for holding that the unit is appropriate?

2. In such a proceeding, may a sub-contractor who is awarded a contract to provide services at a facility be held to be a successor of the previous sub-contractor and required to bargain with the union representing the previous sub-contractor's employees, where: (a) there is a total absence of dealings between the two sub-contractors; (b) the previous sub-contractor's performance at the facility constitutes a small portion of its total business, the balance of which was not affected by the change of sub-contractors; (c) the performance of the contract is integrated into the new sub-contractor's previously existing business; (d) there is a change in supervision at the facility by the new sub-contractor; and (e) within six months after the awarding of the contract the previous sub-contractor's employees constitute less than a majority of employees employed at the facility?

Statutes Involved.

The relevant provisions of the Labor Management Relations Act, 1947, as amended (herein the "Act"), 29 U.S.C. Sections 151, *et seq.*, (1964) and of Administrative Procedure Act, 5 U.S.C. Section 557(c), (1966) are set forth in Appendix E.

Statement of the Case.

On March 8, 1967, following an election conducted by the Board, International Union, United Plant Guard Workers of America and its amalgamated Local Union No. 162 (herein "UPGWA") was certified as the bargaining representative of the guards employed by The Wackenhut Corporation at a facility of Lockheed Aircraft Service Company (herein the "Facility"). Lockheed is a prime Government contractor, and the Facility was used in connection with work on Government contracts. There was no hearing and the regional director made no determination regarding the appropriateness of the collective bargaining unit. Instead, the election was conducted pursuant to a Stipulation For Certification Upon Consent Election.

On April 29, 1967, Wackenhut and UPGWA entered into a collective bargaining agreement (herein the "Wackenhut agreement"), which terminated on April 28, 1970. On July 1, 1967, Petitioner replaced Wackenhut as the sub-contractor providing plant protection services at the Facility. Wackenhut's performance at the Facility had been part of its operations in California, which consisted of between 200 and 300 plant protection contracts. Petitioner did not take over Wackenhut's other contracts. There were no dealings between Petitioner and Wackenhut. All business dealings were between Petitioner and Lockheed, or

Wackenhut and Lockheed. Petitioner did not take over Wackenhut's assets, records, books, supplies or uniforms. Petitioner's performance at the Facility was integrated into the operation of its existing nationwide organization. The work at the Facility was part of Petitioner's Pacific Division, Los Angeles Branch and Ontario Sub-Office. The Ontario Sub-Office administered 30 contracts in addition to the Facility contract.

Within the Ontario Sub-Office area,* uniform policies and practices existed with respect to labor relations, personnel matters, employment and training of guards. Determinations concerning matters which were normal subjects of collective bargaining were not made at the Facility level. Guards within the Ontario Sub-Office area had the same pay scales, vacations, working conditions, fringe benefits and were subject to the same disciplinary procedures. Facility personnel did not recruit guards, prepare payroll checks, purchase uniforms and supplies, or maintain personnel records. A central radio network was used hourly by Petitioner to contact and control all of its employees in the Ontario Sub-Office area.

Except for a single job supervisor, Petitioner's guards at the Facility had common supervision with guards performing at Petitioner's other jobs in the Ontario Sub-Office area. The job supervisor had no authority with respect to the formulation of labor relations policy. He had no authority to hire, and could only terminate guards for certain specified reasons. Petitioner did not retain Wackenhut's supervisors.

It was Petitioner's practice to interchange guards, both temporarily and permanently, on a daily basis.

*As used herein the term "Ontario Sub-Office area" shall refer to the area supervised through the Ontario Sub-Office excluding Los Angeles County. Petitioner's guards in Los Angeles County were represented by the American Federation of Guards.

Such interchange had a direct impact on the composition of the work force at the Facility. Initially, Petitioner employed 42 guards at the Facility, 27 of whom were former Wackenhut guards, and 15 of whom were Petitioner's guards who had been transferred thereto from Petitioner's other jobs. Within six months after Petitioner replaced Wackenhut, former Wackenhut guards constituted less than a majority of the guards at the Facility, as a result of the transfer of guards from Petitioner's other jobs and new hires.

After July 1, 1967, UPGWA demanded that Petitioner recognize it as the exclusive representative of Petitioner's employees at the Facility, and that Petitioner honor the Wackenhut agreement. Petitioner rejected these demands. UPGWA then filed unfair labor practice charges alleging, *inter alia,* that Petitioner had violated the Act by refusing to recognize and bargain with it.

Before the court of appeals, the Board and the trial examiner, Petitioner argued that due to the nature of its operation a collective bargaining unit of Facility guards was not appropriate; and therefore, Petitioner was not obligated to recognize or bargain with UPGWA. Petitioner also argued that even if the unit was appropriate, it was not Wackenhut's successor due to the changes in the employing industry.

The Board's only finding concerning the appropriateness of the Facility unit was its *pro forma* adoption of the trial examiner's findings, conclusions and recommendations. The trial examiner had stated:

> "Respondent challenges the appropriateness of the bargaining unit as applied to Wackenhut and as applied to Respondent. While a broader unit might have been appropriate, I find a unit of

> guards limited to a single facility is an appropriate unit. Here the certification was pursuant to a consent election agreement. There is no evidence that the Regional Director was arbitrary or capricious. A mere change of employers does not destroy the certification." (A. p. 32)*

Thus, the Board and the trial examiner merely referred to the prior certification, which was by way of consent election agreement between UPGWA and Wackenhut. Neither analyzed the relevant factors upon which the appropriateness of a collective bargaining unit is determined. The prior certification, which occurred in a proceeding which Petitioner was not a party to, was not sufficient to justify the Board's order. Indeed, Petitioner's right to contest the appropriateness of the collective bargaining unit as applied to it was not challenged below.**

Petitioner urged the court of appeals to remand the case to the Board so that the Board could articulate the reasons for its unit decision. The court of appeals decided that the Board did not abuse its discretion by concluding that the unit was appropriate as applied to Petitioner, and ordered Petitioner to recognize and bargain with UPGWA, as Wackenhut's successor. (See A. p. 4).

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*The designation (A. p. 32) refers to page 32 of the Appendix attached hereto. Similar designations will be used herein.

**The Board and courts of appeals have permitted employers to test a certification where it is urged that subsequent operational changes have rendered the certified unit inappropriate. See *NLRB v. Zayre Corp.*, 424 F.2d 1159 (5th Cir. 1970), *enforcing*, 170 NLRB No. 190 (1968); *NLRB v KVP Sutherland Paper Co.*, 356 F.2d 671 (6th Cir. 1966); *Cutter Laboratories*, 116 NLRB 260 (1956) (in all of the foregoing cases the employer was permitted to urge that changes in operations, which were made during the year following certification, rendered the certified unit inappropriate).

REASONS FOR GRANTING THE WRIT.

1. The Board's failure to fully articulate the reasons for its bargaining unit determination directly conflicts with this Court's decision in *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965).

In *Metropolitan*, an employer refused to bargain with a union in order to test the appropriateness of a collective bargaining unit certified by the Board. The Board, without articulating specific reasons, adhered to the unit decision made in the representation proceeding, and held that the employer had violated Sections 8(a)(1) and (5) of the Act. Since the decision made in the representation proceeding did not contain a full statement of the basis for the unit determination, this Court ordered that the case be remanded to the Board so that it could articulate reasons for finding the unit appropriate.

The basis of *Metropolitan* is that unless a Board decision contains articulated reasons it cannot be properly reviewed because a court cannot determine whether the Board has correctly exercised the authority and discretion granted it by Congress. See 380 U.S. at 442-443.

Similar to the position of the employer in *Metropolitan*, the Petitioner's obligation to recognize and bargain with UPGWA is dependent on a finding that there is an appropriate collective bargaining unit. In the instant case, as in *Metropolitan*, it is impossible to determine on what basis the Board exercised its discretion in holding that the Facility unit was appropriate.

Further, the Board's decision that the Facility unit was appropriate as applied to Petitioner was inconsistent with other unit decisions.*

The court of appeals only had before it the *post hoc* rationalizations of the Board's counsel. In *Metropolitan*, this Court stated that:

> ". . . Although Board counsel in his brief and argument before this Court has rationalized the different unit determinations in the variant factual situations of these cases on criteria other than a controlling effect being given to the extent of organization, the integrity of the administrative process requires that 'courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . .' *Burlington Truck Lines v. United States, supra,* [371 U.S.] at 168; see *Securities & Exchange Comm'n v. Chenery Corp.,* 332 U.S. 194, 196. For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency' . . ." (380 U.S. at 443-444.)

Further, the Board's decision was in violation of Section 7 of the Administrative Procedure Act which, in relevant part, requires all decisions to contain "a state-

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*See *NLRB v. Pinkerton's, Inc.,* 428 F.2d 479 (6th Cir. 1970); *NLRB v. Pinkerton's, Inc.,* 416 F.2d 627 (7th Cir. 1969); *NLRB v. Solis Theatre Corp.,* 403 F.2d 381 (2d Cir. 1968); *NLRB v. Pioneer Natural Gas Co.,* 397 F.2d 573 (5th Cir. 1968); *NLRB v. Purity Food Stores, Inc.,* 376 F.2d 497 (1st Cir.). *cert. denied,* 389 U.S. 959 (1967); *Pacific Drive-In Theatres Corp.,* 167 NLRB 661 (1967); *Paul M. O'Neill Int'l Detective Agency, Inc.,* 115 NLRB 760 (1956).

ment of . . . findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. Section 557(c) (1966). See *NLRB v. Clement-Blythe Companies*, 415 F.2d 78 (4th Cir. 1969).*

The issue raised herein was not covered by this Court's recent decision in *Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971). In *Magnesium Casting*, an employer sought to test a regional director's bargaining unit determination by refusing to bargain with the union. The Board, without a complete review of the regional director's determination, held that the employer had committed an unfair labor practice by its refusal to bargain. The issue was whether the Board in an unfair labor practice proceeding must grant plenary review of the regional director's unit determination made in the representation proceeding. This Court held that in view of Section 3(b) of the Act, the Board, in an unfair labor practice case, was not required to undertake a plenary review of a regional director's unit determination made in the representation case. This Court noted that the regional director's decision was based upon the same rules regarding fact finding as would apply to the Board. This Court, citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941), stated that:

> ". . . Historically, the representation issue once fully litigated in the representation proceeding could not be relitigated in an unfair labor practice proceeding." (401 U.S. at 141.)

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*Cf. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763-767 (1969), where the Board was criticized for failing to follow the procedures of the Administrative Procedure Act related to rule-making.

Magnesium Casting was not a case where there was a complete failure to articulate the basis for the unit determination. The basis for the determination was fully set forth in the regional director's decision. In the instant case, there was no regional director's determination, but merely the regional director's approval of a consent election agreement between UPGWA and Wackenhut. Petitioner had the right to fully litigate the appropriateness of the unit as applied to it; and under *Metropolitan* and the Administrative Procedure Act, the Board or its agents at some stage of the proceedings were required to fully articulate the reasons for the unit decision.

2. The court of appeals failure to remand the case to the Board for it to fully articulate the basis for its unit determination conflicts with the decisions of other courts of appeals.

Courts of appeals of other circuits, in circumstances similar to the instant case, have refused to enforce the Board's bargaining orders and have remanded cases to the Board, where the Board has failed to articulate the reasons for holding a bargaining unit appropriate. *Upholsterers' International Union v. NLRB*, 419 F.2d 179 (3d Cir. 1969); *Rayonier Inc. v. NLRB*, 380 F.2d 187 (5th Cir. 1967); *NLRB v. Groendyke Transport, Inc.*, 372 F.2d 137 (10th Cir. 1967); *NLRB v. Davis Cafeteria, Inc.*, 358 F.2d 98 (5th Cir. 1966); *NLRB v. Purity Food Stores, Inc.*, 354 F.2d 926 (1st Cir. 1965). The failure of the court of appeals to remand the instant case to the Board is in conflict with such decisions. Even if the court was of the opinion that the unit was appropriate, it should have denied enforcement, pending a proper Board decision. See *NLRB v. Purity Food Stores, Inc.*, 354 F.2d 926, 931 (1st Cir. 1965).

3. The court of appeals decision enforcing the Board's finding of successorship conflicts with the decisions of other courts of appeals.

The decisions of courts of appeals and the Board on the requirements for successorship are irreconcilable and in conflict with the decisions in the instant case. In *NLRB v Alamo White Trucking Services, Inc.*, 273 F.2d 238 (5th Cir. 1959) the court refused to enforce a Board bargaining order because it held that the employer was not a successor. The new employer did not purchase accounts receivable, assume indebtednesses or obligations, or acquire books or records of the former employer. The new employer brought in its own management, obtained its own business licenses, used a different method of financing, and changed the business from a national operation to a local operation. Further, the new employer did not operate all of the departments that had been previously operated. However, the new employer did use the predecessor's building under a one year lease for the servicing of trucks; and retained one of the former employer's supervisors, as well as 8 of 14 of the former employer's employees. Thus, a majority of the new employer's work force were employees of the former employer and were engaged in the same work, at the same location, under the same supervision.* Based on all of the foregoing facts, the court concluded that there had been a change in the employing industry, and that the new employer was not obligated to recognize and bargain with the union which had represented the employees of the former employer. *See also, IAM, District Lodge 94 v. NLRB*, 414 F.2d

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*See *Alamo White Trucking Service, Inc.*, 122 NLRB 1174, 1176 (1959).

1135 (D.C. Cir.), *cert. denied*, 396 U.S. 889 (1969); *NLRB v. Aluminum Tubular Corp.*, 299 F.2d 595 (2nd Cir. 1962).

In contrast to *NLRB v. Alamo White Trucking Services, Inc.*, the determinations on successorship in the instant case were based upon a myopic analysis of the facts. In concluding that the employing industry remained unchanged, the court of appeals and the Board only looked at the facts concerning numbers of employees and work location, and disregarded not only the fact that there were no dealings between Petitioner and Wackenhut,* but also the fact that both Petitioner and Wackenhut had substantial existing organizations apart from their operations at the Facility. Petitioner's performance at the Facility did not affect the remaining parts of Wackenhut's business. The extent of integration of Petitioner's operation at the Facility is evidenced by the common supervision, labor relations policies and practices, wage scales, benefits and working conditions in the Ontario Sub-Office area, and employee interchange between Facility employees and Petitioner's other employees. It is significant that within six months after Petitioner commenced performance at the Facility, former Wackenhut guards constituted less than a majority of the work force. If the employing industry was changed in *NLRB v. Alamo White Trucking Services, Inc.*, it also was changed herein. The decision of the court of appeals on successorship in the instant case is in conflict with the decision

*In so doing, the court of appeals cited approvingly *Tom-A-Hawk Transit Inc. v. NLRB*, 419 F.2d 1025 (7th Cir. 1969). The Board relied on its decision in *Maintenance Inc.*, 148 NLRB 1299 (1964).

of the court of appeals in *NLRB v. Alamo White Trucking Services, Inc.*

The Board's decision in *Lincoln Private Police, Inc.*, 189 NLRB No. 103 (1971) is also irreconcilable with its decision in the instant case. In *Lincoln*, the respondent, an employer which provided plant protection services, solicited and obtained 42 percent of the former clients of another employer, Industrial Security Guards, Inc., which went out of business. A different company also obtained a substantial number of Industrial's other clients. Industrial's guards in the San Juan metropolitan area were represented by a union. The respondent did not assume any of the Industrial's assets and used different uniforms, vehicles and equipment, and had its own offices. However, 61 out of the respondent's total employee complement of 66 were former Industrial employees, who continued to work at their previous posts. The Board held that the former city-wide bargaining unit had been fragmented, the employing industry changed; and therefore, the respondent was not a successor. (See also, *Northwest Galvanizing Co.*, 168 NLRB 26 (1967).) Many of the factors in *Lincoln* which influenced the Board to find against successorship are present in the instant case.

4. The questions presented herein involve important issues of federal law which should be settled by this Court.

In order that there be proper judicial regulation of administrative agencies, it is necessary that a reviewing court have before it proper agency decisions. The failure of agencies to render decisions which contain articulated reasons on all issues of fact and law causes litigation to be protracted and the administrative agen-

cies to be discredited. This practice should be prohibited by this Court.

The lack of a definitive test for determining successorship in unfair labor practice cases has created a problem meritorious of resolution by this Court. At the present time there is no clearly defined test used by the Board and the courts of appeals in resolving successorship issues in such matters. It is not posssible to determine the weight given to various factors by the courts and the Board. A perfect example of this unpredictability is the instant case. Factors which were determinative in *NLRB v. Alamo White Trucking Services, Inc., supra, Lincoln Private Police, Inc., supra,* and *Northwest Galvanizing Co., supra,* were present but were not determinative herein. The need for clear criteria for determining successorship is especially important in cases involving contractors who are awarded contracts on the basis of competitive bids without any dealings with one another. There are hundreds of thousands of employees in the plant protection, maintenance, and other industries, who work for employers providing services under such contracts. In these industries third parties retain the right to change contractors on short notice. Therefore, turnover of employers is great and problems concerning successorship arise frequently. This Court should resolve the conflict and clarify the law concerning successorship in unfair labor practice cases.

There is yet another reason for this Court to consider the successorship issue. Petitioner was awarded the Facility contract on the basis of competitive bidding by Lockheed, a prime Government contractor. Petitioner's employees needed top-secret security clearances because of Lockheed's Government contracts. It is im-

portant that the United States Government and its prime contractors be permitted to change sub-contractors with as little difficulty as possible. The Board's finding of successorship in the instant case can have the effect of reducing competition among Government sub-contractors. Indeed, even the Board appears to have recognized this problem. In *Emerald Maintenance, Inc.*, 188 NLRB No. 139 (1971), the Board held that the rule, established by it in the instant case but not enforced by the court of appeals, that a successor employer is bound by its predecessor's collective bargaining agreement, does not apply to Government prime contractors who are subject to the Service Contract Act. 41 U.S.C. Section 351, *et seq.* (1964). Even though the Service Contract Act did not apply at the Facility, the rule of *Emerald Maintenance* should also apply to Government sub-contractors, like Petitioner, since many of the reasons given by the Board in *Emerald Maintenance* for treating Government contractors differently are present herein. It is submitted that in view of the fact that Petitioner was a Government sub-contractor, the present case requires a more rigorous test for successorship than that used by the court of appeals and the Board.

Conclusion.

For the foregoing reasons, it is urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

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August 5, 1971.

APPENDIX A.

Opinion.

United States Court of Appeals, for the Second Circuit.

The William J. Burns International Detective Agency Inc., *Petitioner,* v. National Labor Relations Board, *Respondent,* International Union, United Plant Guard Workers of America and Its Amalgamated Local Union No. 162, *Intervenor.* Nos. 401-402—September Term, 1970. (Argued March 8, 1970; Decided April 26, 1971.) Docket Nos. 34889, 35055.

Before:

Hays and Feinberg, *Circuit Judges,* and Curtin, *District Judge.**

Hays, *Circuit Judge:*

From 1962 until 1967 the Wackenhut Corporation provided plant protection services for the facility of the Lockheed Aircraft Service Company located at Ontario International Airport, Ontario, California. In 1967 Lockheed arranged with the William J. Burns International Detective Agency, petitioner on this appeal, to take over the plant protection duties from Wackenhut and on May 31, 1967 Lockheed notified Wackenhut that Burns would take over on July 1.

On March 8, 1967 the International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162 were certified as representatives of Wackenhut's employees working at Lockheed and on April 29, 1967 Wackenhut and the union entered into a collective bargaining agreement to be in effect from April 29, 1967 until April 28, 1970.

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*Of the United States District Court for the Western District of New York, sitting by designation.

On July 1, 1967 Burns took over the plant protection work at Lockheed. Burns employed for this purpose 42 guards, 27 of whom had previously been employed by Wackenhut.

The United Plant Guard Workers demanded that Burns recognize the union as the exclusive representative of Burns' employees at Lockheed and honor the collective agreement which the union had negotiated with Wackenhut. Burns refused both requests and the union thereupon filed unfair labor practice charges with the Board.

The Board, affirming a Trial Examiner's decision, held that Burns had violated Sections 8(a)(2) and (1) of the National Labor Relations Act (29 U.S.C. §§158-(a)(2) and (1) (1964)) by unlawfully recognizing and assisting the American Federation of Guards, a "rival" union; that it had violated Sections 8(a)(5) and (1) (29 U.S.C. §§158(a)(5) and (1) (1964)) by failing to recognize and bargain with the United Plant Guard Workers of America; and that Burns was obligated to honor the collective bargaining agreement which had been entered into between the latter union and the Wackenhut Corporation. Burns petitions for review of the Board's order except for that portion charging it with unlawful assistance and recognition of the American Federation of Guards; the Board cross petitions to enforce the entire order. We enforce the Board's order except for that part which requires the company to honor the collective agreement between Wackenhut and its union.

I.

The Board found that Burns violated Sections 8(a)-(2) and (1) of the Act by unlawfully assisting and

recognizing the American Federation of Guards. Although Burns has not petitioned for review of this portion of the order, it apparently seeks to avoid the consequences of the Board's action by stating that it "has elected to comply with that portion of the Board's order requiring it to cease and desist from recognizing the American Federation of Guards as representative of its guards at the Facility." The fact, however, that the employer is willing to comply does not render the cause moot; the Board may still seek and secure enforcement from the courts. *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950). The Board's finding of unlawful assistance and recognition is amply supported by the record. We enforce that part of its order.

II.

The remainder of the Board's order deals with its finding that Burns unlawfully refused to recognize and bargain with the United Plant Guard Workers of America and to honor the collective bargaining agreement which that union negotiated with Burns' predecessor, Wackenhut.

Burns first contends that a bargaining unit limited only to Burns guards working at Lockheed is not appropriate and that therefore, the Board's order is not enforceable. Burns argues that the high degree of integration of its Ontario Sub-Office, which managed 30 contracts in addition to the contract at Lockheed, required a bargaining unit encompassing the entire area, particularly in view of the centralized control of labor relations that Burns claims existed there. The Board on the other hand, argues, in support of its finding, that Burns' employees serviced the same facility that was considered an appropriate unit for Wackenhut's em-

ployees, that Burns' employees had a community of interest, were supervised by one man on a full-time daily basis who had hiring and firing authority, and were paid a distinctly higher wage than other Burns employees in the Los Angeles branch area (which included Ontario).

The Board has a large measure of discretion in making unit determinations. See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947); *Continental Insurance Co. v. NLRB*, 409 F.2d 727, 728 (2d Cir.), cert. denied, 396 U.S. 902 (1969). The centralization of final decisions on labor policy is not per se decisive of the extent of an appropriate unit where the Board has substantial justification for establishing a smaller unit. *Continental Insurance Co. v. NLRB, supra* at 729. We cannot say that the Board lacked such justification in this case.

We agree as well with the Board's finding that Burns is a successor employer to Wackenhut and as such is required to recognize the union chosen by Wackenhut's employees. See, e.g., *Tom-A-Hawk Transit, Inc. v. NLRB*, 419 F.2d 1025, 1026-1027 (7th Cir. 1969). The determination that an employer is a successor is made on the basis of "continuity in the business operation," *NLRB v. Zayre Corp.*, 424 F.2d 1159, 1162 (5th Cir. 1970), that is, whether the operation is "essentially the same as that previously conducted. . . ." *S. S. Kresge Co. v. NLRB*, 416 F.2d 1225, 1234 (6th Cir. 1969). Has the "employing industry . . . retained its identity and continuity to a degree sufficient to make it reasonable that the successor employer be required to recognize the incumbent union[?]" (*Tom-A-Hawk Transit, Inc. v. NLRB, supra* at 1027.) We think that it has in the instant case.

All of the important factors which the Board has used and the courts have approved are present in the instant case: "continuation of the same types of product lines, departmental organization, employee identity and job functions." *NLRB v. Zayre Corp., supra* at 1163 (footnotes omitted). Both Burns and Wackenhut are nationwide organizations; both performed the identical services at the same facility; although Burns used its own supervisors, their functions and responsibilities were similar to those performed by their predecessors; and finally, and perhaps most significantly, Burns commenced performance of the contract with 27 former Wackenhut employees out of its total complement of 42.[1]

III.

From the fact that Burns was the successor of Wackenhut within the meaning of that term as applied by the Board and the courts, and was required to recognize the union chosen by Wackenhut's employees, it does not follow that Burns could be ordered by the Board to honor the collective agreement to which Wackenhut and its union were parties. In none of the previous successorship cases has the Board ever reached that result. The successor has always been held merely to have the duty of bargaining with his predecessor's union. We conclude that in ordering Burns to honor

[1]Although the absence of wholesale hiring of predecessor's employees does not require a finding that there has been no successorship, see *Monroe Sander Corporation v. Livingston*, 377 F.2d 6, 12 (2d Cir.), cert. denied, 389 U.S. 831 (1967), its presence is relevant "to show similarity of operations." *Id.* The Court in *John Wiley & Sons v. Livingston*, 376 U.S. 543, 551 (1964) placed great stress on this single factor by holding that "relevant similarity and continuity of operation across the change in ownership is adequately evidenced by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty."

the contract executed by Wackenhut, the Board has exceeded its powers. Neither the applicable case law nor the national labor policy justifies the Board in imposing a collective agreement upon an unwilling party who had no part in the negotiation of the agreement.

The action of the Board in this case is contrary to the letter as well as the spirit of the Supreme Court's recent decision in *H. K. Porter Co., Inc. v. National Labor Relations Board,* 397 U.S. 99 (1970). That case held that the Board and the courts "[are] without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement." *Id.* at 102. As the Court points out, the legislative history of the National Labor Relations Act and of the enactment of §8(d) of the Act,[2] strongly supports the conclusion that "the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *Id.* at 108.

> "While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *Id.* at 108.

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[2]Section 8(d) reads as follows:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .*" 29 U.S.C. §158(d) (1964) (emphasis added).

The Board professes to find authority for its order to Burns to honor the Wackenhut contract in *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

The Board does not claim that *Wiley* stands directly for the proposition that all of a predecessor's contractual obligations can be imposed on an unwilling successor. The holding of *Wiley* is merely that "in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement." *Id.* at 548. Indeed, the *Wiley* case arose in the context of an action to compel arbitration under §301 of the Labor Management Relations Act. (29 U.S.C. §185 (1964).)

The Board contends, however, that the policy considerations upon which *Wiley* is based support its action in this case. But the policy behind the decision in *Wiley* was founded upon the Court's recognition of "the central role of arbitration in effectuating national labor policy." *Id.* at 549.[3] The Court's determination is only that "the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed." *Id.* at 550 (footnote omitted).

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[3]The Court repeatedly emphasized this basis for its decision and the limited effect of its holding:

> "Here, the question is whether Wiley, which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration depends, is bound at all *by the agreement's arbitration provision*.
>
> . . . .
>
> . . . It would derogate from *'the federal policy of settling labor disputes by arbitration,'* . . . if a change in the corporate structure and ownership of a business enterprise had the automatic consequence of *removing a duty to arbitrate* previously established." *John Wiley & Sons v. Livingston*, 376 U.S. 543, 547, 549 (1964) (citation omitted) (emphasis added).

Although it is true that a rule such as that promulgated by the Board would put future potential successor employers on notice that existing contracts would be obligatory on them and thus provide them with a choice of action, the rule would bind the union to a contract with a successor employer without giving it any opportunity for choice. This could sometimes result in serious inequities. For example, where a union made substantial concessions to a failing employer in order to keep him in business and then discovered that the successor was a strong, financially viable organization, it would have no chance to bargain anew. The Board's holding that it will consider "unusual circumstances" (see, e.g., *Emerald Maintenance, Inc.*, 188 N.L.R.B. No. 139 (1971) where the Board, citing "unusual circumstances," refused to apply the rule it had earlier laid down in *Burns*) is no answer since it merely arrogates to the Board the additional power to pick and choose among the contractual provisions it will impose on non-contracting parties.

We refuse enforcement to that portion of the Board's order that requires Burns to honor the terms of the collective agreement between the union and Wackenhut.

APPENDIX B.

Decision and Order.

United States of America, Before the National Labor Relations Board.

The William J. Burns International Detective Agency, Inc. and International Union, United Plant Guard Workers of America and Its Amalgamated Local Union No. 162 and American Federation of Guards, Local 1, Party in Interest. Case 31-CA-776; May 7, 1970.

On June 4, 1968, Trial Examiner E. Don Wilson issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in certain other unfair labor practices. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief, and the Charging Party (herein referred to as the Union) and General Counsel filed briefs in support of the Trial Examiner's Decision.

On January 31, 1969, the National Labor Relations Board, having determined that the instant case raised issues of substantial importance in the administration of the National Labor Relations Act, as amended, ordered that this case be consolidated with three others[1] for the purpose of oral argument before the Board on March 12, 1969. The parties were given permission to

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[1] *Travelodge Corp. et al.*, Case 21-CA-7694; *Hackney Iron & Steel Co.*, Cases 23-CA-2505, 23-CA-2554; and *Kota Division of Dura Corporation*, 18-CA-2419.

file further briefs. Subsequently, on February 19, 1969, the Board extended the date of the oral argument to April 23, 1969.

The Board also invited certain interested parties to file briefs *amici curiae* and to participate in oral argument. Briefs were filed by: The Chamber of Commerce of the United States; American Federation of Labor and Congress of Industrial Organizations; International Union, United Automobile, Aerospace and Agriculture Implement Workers; The International Brotherood of Teamsters, Chauffeurs, Warehousemen & Helpers of America; and the National Federation of Independent Unions. The Chamber of Commerce of the United States, The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and the National Federation of Independent Unions did not choose to participate in the argument. The National Association of Manufacturers declined to either file a brief or participate in the argument.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, the oral arguments, Respondent's motions to reopen the record and the General Counsel's and Charging Party's opposition thereto, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

Briefly, the facts show that Wackenhut performed plant protection services for Lockheed Aircraft Service Company, Ontario International Airport, Ontario, California. On March 8, 1967,[2] the Union was certified as

[2]Hereinafter, all dates refer to 1967 unless otherwise stated.

exclusive bargaining representative for all Wackenhut's full-time and regular part-time plant protection employees. On April 29, Wackenhut and the Union entered into a collective-bargaining agreement effective until April 28, 1970.

Pursuant to its agreement with Wackenhut, Lockheed let the service contract out for bids. On may 15, at a prebid conference attended by several general service contractors including the Respondent, Burns, Lockheed advised the prospective bidders that Wackenhut's guards were represented by the Union which had a recent Board Certification, and that there was in existence a labor contract between Wackenhut and the Union covering these employees. On May 31, Wackenhut was informed by Lockheed that Respondent would perform the guard services as of July 1.

Prior to its July 1 takeover, Respondent interviewed guards for employment who were at that time employed by Wackenhut. As more fully described by the Trial Examiner, the Respondent assisted the American Federation of Guards in the solicitation of employees Elmer Reitzel, Thomas Ware, Charles Blankemeier, Harris Camp, Stanley Ganiewski, and Walter Drake. On June 29, Respondent recognized the American Federation of Guards as bargaining representative.

On July 1, when Respondent officially began the guard service duties theretofore performed by Wackenhut, some 27 guards formerly working at Lockheed in the employ of Wackenhut began work as guard employees of Respondent. In addition, 15 employees of Respondent were transferred from other jobs and began work at Lockheed. Thus, in assuming guard functions at Lockheed, a majority of Respondent's work force was

made up of ex-Wackenhut employees, and the nature of the business remained the same.

On July 12, the Union, by letter, made a demand upon Respondent that it recognize the Union as bargaining representative and honor the Union's collective-bargaining agreement with Wackenhut. By letter dated July 24, the Respondent declined recognition. Unfair labor practice charges were then filed which resulted in the issuance of the complaint in the instant proceeding.

The Trial Examiner concluded that Respondent violated Section 8(a)(2) and (1) of the National Labor Relations Act, as amended, by assisting the American Federation of Guards in organizing employees, and by recognizing the American Federation of Guards when it did not represent an uncoerced majority of Respondent's employees. In addition, the Trial Examiner found that Respondent was a successor employer to Wackenhut and that it violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the bargaining representative of its employees. We agree with these findings of the Trial Examiner.

We also agree with the Trial Examiner that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to abide by the 1967 contract between Wackenhut and the Union. However, in view of the significance of the issue presented, we believe it is necessary to explicate fully our reasons for doing so.

The Supreme Court's Decision in *John Wiley & Sons v. Livingston*[3] altered the perspective in which a suc-

[3] 376 U.S. 543.

cessor employer's obligations to honor the provisions of a collective-bargaining agreement negotiated by his predecessor must be viewed. There, the predecessor employer was absorbed by merger into a larger acquiring company (Wiley). Some of the predecessor's employees were represented by a union, and the collective-bargaining contract, which did not contain a successors clause, was not scheduled to expire until over a year after the merger took place. Pursuant to an arbitration clause in the contract, the union brought suit to compel Wiley to arbitrate its claim that certain contract rights had survived the merger. The Court held that even though the predecessor had disappeared as a result of the merger, all rights of the employees covered by the preexisting collective-bargaining agreement did not terminate. The Court determined that under the circumstances presented Wiley was bound to arbitrate its obligations under the preexisting collective-bargaining agreement.

In reaching its conclusion, the Court specifically rejected the contention that Wiley could not be required to arbitrate under the preexisting collective-bargaining agreement because it was not a party to that agreement and had not consented to be bound by it. The Court stated at 376 U.S., 550:

> While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, (footnote omitted), a collective bargaining agreement is not an ordinary contract . . . '[I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . The collective bargaining agreement covers the whole employment relationship. It calls into being a new com-

> mon law—the common law of a particular industry or of a particular plant.' (Citation omitted) . . . Central to the peculiar status and functions of a collective bargaining agreement is the fact dictated both by circumstances . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship.

As the foregoing indicates, the Supreme Court refused to rely upon common law contract doctrine in determining the nature of a purchasing-employer's obligation to arbitrate matters arising under a contract it had not signed. Rather, the Court construed the contract in the context of a national labor policy which accords a central role to arbitration as "the substitute for industrial strife" and as "part and parcel of collective bargaining itself" and found the necessary contractual foundation for the duty to arbitrate in the contract negotiated by Wiley's predecessor:

> "Therefore, although the duty to arbitrate, as we have said . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy." (376 U.S. 551).

The concept of substantial continuity in the employing industry enunciated as a necessary condition for the survival of the duty to arbitrate when the ownership of a business changes hands is at the heart of our determination that a purchasing employer is a successor-employer within the meaning of the Act. In essence, the finding of successorship involves a judgment that the employing industry has remained essentially the same despite the change in ownership.[4] A normal consequence of such finding is that the successor employer is obligated to recognize and bargain with the union duly selected by the employees—albeit prior to the change in ownership—as their collective-bargaining representative. This consequence of successorship is rooted, *inter alia*, in the fact that

> "[i]t is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace. . . .,"[5]

as well as in the fact that, having chosen a bargaining representative,

> "[t]here is no reason to believe that the employees will change their attitudes merely because the identity of their employer has changed."[6]

Binding the successor-employer to his predecessor's bargaining obligation furthers the policy of protecting the employees' exercise of the right to engage in collective bargaining through representatives of their own choosing. Requiring the successor-employer to negotiate proposed changes in existing terms and conditions of

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[4]See, e.g., *Cruse Motors, Inc.*, 105 NLRB 242, 247.

[5]*Kiddie Kover Co. v. N.L.R.B.*, 105 F. 2d 179, 188 (C.A. 6).

[6]*N.L.R.B. v. Albert Armato*, 199 F. 2d 800, 803 (C.A. 7).

employment with the employees' bargaining representative promotes stability in the employing enterprise's labor relations and furthers the interests of industrial peace. The obligation to bargain imposed on a successor-employer includes the negative injunction to refrain from unilaterally changing wages and other benefits established by a prior collective-bargaining agreement even though that agreement has expired.[7] In this respect, the successor-employer's obligations are the same as those imposed upon employers generally during the period between collective-bargaining agreements.[8]

The question before us thus narrows to whether the national labor policy embodied in the Act requires the successor-employer to take over and honor a collective-bargaining agreement negotiated on behalf of the employing enterprise by the predecessor. We hold that, absent unusual circumstances, the Act imposes such an obligation.

"The history of the collective bargaining process demonstrates that its object has long been an agreement between employer and employees as to wages, hours and working conditions evidenced by a signed contract or statement in writing, which serves both as recognition of the union with which the agreement has been reached and as a permanent memorial of its terms . . . [t]he signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife." (*Heinz Co. v. N.L.R.B.*, 311

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[7]*Harold W. Hinson d/b/a Hen House Market No. 3*, 175 NLRB No. 100, enforced, F.2d (C.A. 8) (1970). *Overnite Transportation Co.*, 157 NLRB 1185, enfd. 375 F.2d 765 (C.A. 4), cert. denied 398 U.S. 838.

[8]*Marine & Shipbuilding Workers v. N.L.R.B.* 320 F.2d 615 (C.A. 3)

U.S. 514). In enacting the 1947 amendments to the Act, Congress added Section 8(d) in which it defined in some detail the duty to bargain collectively, including within that definition a specific ratification of the holding in the *Heinz* case.

Section 8(d) also defined the duty to bargain as meaning that, "where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce. . . . . no party to such contract shall terminate or modify such contract", unless it serves prescribed notices on the other party, and maintains its contract in effect for 60 days therefrom, even though that period may extend beyond the contract's natural termination or expiration date. Section 8(d) also provides that a party to a collective-bargaining agreement has the right to refrain from discussing modifications which are to take effect prior to the period fixed by the contract itself for reopening negotiations. Section 8(d) thus clearly demonstrates Congress' recognition of the paramount role in maintaining industrial peace played by parties' adherence to existing collective-bargaining agreements.

The impressive policy considerations favoring the maintenance and adherence to existing collective-bargaining agreements are not wholly overborne by the fact that Burns has not signed the contract here in issue. Nor can a holding that Burns is obligated to honor and adhere to the express terms of the contract readily be equated with compelling Burns to agree to a bargaining proposal or make a concession it is unwilling to make.[9] Indisputably, there is a contract.

[9]Section 8(d) provides that performance of the mutual obligation to bargain does not compel either party to agree to a proposal or require the making of a concession.

That contract covers the employees of the employing industry which Burns took over; it was negotiated on behalf of the employing enterprise by Wackenhut, Burns predecessor. That contract is reasonably related to Burns through its takeover of Wackenhut's Lockheed service functions and its hiring of Wackenhut employees. We find, therefore, that Burns is bound to that contract as if it were a signatory thereto, and that its failure to maintain the contract in effect is violative of Sections 8(d) and 8(a)(5) of the Act.[10]

In the normal case, we perceive no real inequity in requiring a "successor-employer" to take over his predecessor's collective-bargaining agreement, for he stands in the shoes of his predecessor. He can make whatever adjustments the acceptance of such obligation may dictate in his negotiations concerning the takeover of the business. Normally, employees cannot make a comparable adjustment. Their basic security is the collective-bargaining agreement negotiated on their behalf. In the instant case this is certainly so. They work in an industry in which the identity of their employer is subject to annual bidding for the right to perform the services they are engaged in furnishing. The contract involved herein was negotiated for a term of 3 years, but had been in existence for only 2 months at the time of Burns' takeover. Burns had knowledge of the agreement when it bid for the Lockheed service contract. It hired employees on whose behalf the agreement was negotiated. Accordingly, in order to fully protect the employees' exercise of the right to bargain collectively and

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[10] *C & S Industries, Inc.*, 158 NLRB 454; *N.L.R.B. v. Huttig Sash & Door Co.*, 377 F.2d 964 (C.A. 8), enforcing 154 NLRB 811. See also, *Oilfield Maintenance Co., Inc., etc.*, 142 NLRB 1384.

to promote the maintenance of stable bargaining relationships and concommittantly industrial peace in this industry, we conclude that Respondent Burns must be held bound to its predecessor's contract.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, The William J. Burns International Detective Agency, Inc., Ontario, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, with the qualification described below.[11]

Dated, Washington, D.C. May 7, 1970.

Frank W. McCulloch, Chairman
John H. Fanning, Member
Gerald A. Brown, Member
NATIONAL LABOR RELATIONS BOARD

[Seal]

[11]Substitute "Judgment" for "Decree" wherever it occurs in footnote 6 of the Trial Examiner's Recommended Order.

Member Jenkins, dissenting:

My partial dissent is as follows:

There is no requirement in the Act that a successor employer be bound by the collective bargaining agreement in effect when the business is transferred. Whether to require the successor to be bound is therefore a matter of judgment or interpretation of the national labor policy. In the absence of a clear statutory command or binding judicial precedent, I would not impose the existing agreement on either the union or the employer.

Where the enterprise is marginal or faltering, the new management may have to rearrange the terms and conditions of employment if the business and the jobs are to survive. The Union also may, as in the companion case of *Kota Division of Dura Corporation*, 182 NLRB No. 51, want the opportunity to alter employment conditions in the light of the new economic circumstances and relations brought into the situation by the new employer. In such cases, our goal should be to permit the parties flexibility in working out their new arrangements if either desires to do so, rather than to impose the existing agreement when one side may be seriously dissatisfied with it. The new employer is not a party to the agreement, and the union did not join in shaping and executing it with his circumstances in mind. Thus, to impose the agreement on the new relation may in many cases prove a source of friction and disruption, rather than the stability for which my colleagues hope.

Section 8(d) of the Act, in requiring "parties" to adhere to their agreements and give notice of termination well in advance, hardly supports the conclusion that the successor is bound by the agreement; for that section

refers only to a "party" to the contract, the successor is not a party, and the issue before us is whether he should be treated as if he were a party.

Unlike my colleagues, who rely principally on *John Wiley and Sons v. Livingston* to require that the existing agreement must continue in effect beyond the transfer of the business, I see little in that case to support that conclusion. The employees' rights at issue there were of a very narrow range, such as seniority, vacation pay, pension contributions and severance pay, rights which were fixed or already accrued by being, at least in part, earned through past performance of work, or "vested" as the Court referred to them. The Court held only that the arbitration clause in the old agreement survived the merger as an available method of resolving issues concerning these "vested" rights. This hardly amounts to a holding that the entire old agreement must be imposed on the new employment relation. Indeed, the Court's approval of arbitration and its inherent flexibility and adjustment to unforeseen circumstances might indicate that the old agreement should not be so imposed.

Accordingly, I would not hold that Burns is bound by the agreement between its predecessor, Wackenhut, and the Union.

Dated, Washington, D. C. May 7, 1970.

Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX C.

Trial Examiner's Decision.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California.

The William J. Burns International Detective Agency, Inc. and International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162 and American Federation of Guards, Local 1 Party in Interest. Case No. 31-CA-776; June 4, 1968.

Statement of the Case

E. DON WILSON, Trial Examiner: The original charge was filed on July 24, 1967, by International Union, United Plant Guard Workers of America and its Amalgamated Local Union, No. 162, herein the Union, and an amended charge was filed on August 1, 1967. Upon the charge as amended, the General Counsel of the National Labor Relations Board, herein the Board, issued a complaint and notice of hearing dated October 25, 1967, alleging that The William J. Burns International Detective Agency, Inc., herein Respondent, had violated Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act, herein the Act.

Pursuant to due notice, a hearing in this matter was held before me in Los Angeles, California, on December 19 and 20, 1967. All parties but the party in interest fully participated. Briefs for the General Counsel, Respondent, and Charging Party have been received and considered.

Upon the entire record[1] in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. Respondent's Business

At all material times, Respondent has been a New York corporation with offices in various parts of the United States, including an office at Los Angeles, California, where it is engaged in providing protective, guard, and detective services to business firms throughout the United States.

In the course and conduct of its business operations, Respondent's Los Angeles office has an annual volume of business in excess of $500,000, and annually performs services valued in excess of $50,000 for firms outside the State of California, and annually performs services valued in excess of $50,000 for firms in the Los Angeles area, each of which ships products valued in excess of $50,000 directly outside the State of California.

The Wackenhut Corporation, herein Wackenhut, is a Florida corporation engaged in plant protection and security services for firms located throughout the United States. In the course and conduct of its business operations, Wackenhut has an annual gross volume of business in excess of $500,000, and it annually performs services valued in excess of $50,000 outside Florida.

Respondent and Wackenhut, each, is and at all material times has been, an employer engaged in commerce within the meaning of the Act.

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[1]The motion to correct the transcript is granted as is the motion to admit Respondent's Exhibit No. 5 into evidence.

II. The Labor Organizations

The Union and American Federation of Guards, Local 1, herein AFG, are labor organizations within the meaning of the Act.

III. The Unfair Labor Practices

A. *The Issues*

The issues include the following:

(1) Is Respondent a successor to Wackenhut;

(2) Is a unit limited to employees of Respondent at Lockheed, appropriate;

(3) Has Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and by refusing to give effect to a contract between Wackenhut and the Union;

(4) Has Respondent violated Section 8(a)(2) and (1) of the Act by recognizing AFG as the bargaining representative of Respondent's employees at Lockheed and by requiring membership in or an application for membership in AFG as a condition of employment at Lockheed;

(5) Did Respondent violate Section 8(a)(1) and (2) of the Act by promising and giving an employee a promotion and a raise because he assisted the AFG; and

(6) Did Respondent violate Section 8(a)(2) and (1) of the Act by assisting AFG in organizing Respondent's employees and by recognizing AFG when AFG did not represent an uncoerced majority of Respondent's employees?

B. *Respondent, Wackenhut and the Appropriate Unit*

At least beginning February 28, 1967,[2] Wackenhut performed plant protection services for Lockheed Aircraft Service Company, herein Lockheed, at Ontario International Airport. On this date, a majority of the employees in the following unit selected the Union as their bargaining representative in a Board election. The unit is:

> All full-time and regular part-time employees of Wackenhut performing plant protection duties as determined in Section 9(b)(3) of the Act at Lockheed, Ontario International Airport; excluding office clerical employees, professional employees, supervisors, and all other employees as defined in the Act.

On March 8, the Regional Director certified the Union as the exclusive bargaining representative of the employees in the above unit.

On April 29, Wackenhut entered into a collective-bargaining contract with the Union to be effective until April 28, 1970. It contained a legal union security provision.

As provided by the agreement between Lockheed and Wackenhut, Lockheed let the service contract out for bids. On May 15, Lockheed advised Respondent that Wackenhut's guards were represented by the Union which had a contract after Board certification. On May 31, Wackenhut was told by Lockheed that Respondent would perform the guard services as of July 1. Wackenhut ceased performing the guard services and Respondent began performing the guard services for

[2]Hereinafter all dates refer to 1967 unless otherwise stated.

Lockheed. On July 1, Respondent's employees included 27 guards formerly employed by Wackenhut and 15 transferred employees of Respondent.

C. *Respondent Assists the AFG*

1. Reitzel

Elmer H. Reitzel was formerly an employee of Wackenhut. He was "Chairman of the Board" of the Wackenhut employees. About June 2, Major George Goddard, a supervisor of Respondent interviewed Reitzel and gave him a job application. A few days later, Reitzel spoke to Mr. New, Respondent's Operations Manager, and a supervisor, about the job. New told Reitzel to see Jack Foley, an organizer for the AFG. Foley was seated from 15 to 30 feet away from New, in the same room. Foley gave Reitzel an AFG authorization card to sign and said employees had to belong to the AFG to work for Respondent, but Reitzel did not then sign it. Foley said Respondent couldn't live with the Union's contract. Reitzel asked for a copy of the AFG contract but did not get one. Foley told Reitzel that as steward he would like to have him get the employees to sign authorization cards for the AFG. Reitzel said he'd talk to the employees. Reitzel left and then called a representative of the Union in Detroit. Reitzel told the representative Respondent and AFG wanted the employees to sign authorization cards to keep their jobs. The representative said it was all right if it meant their jobs. Foley mailed pledge cards to Reitzel. About 2 days later, Foley came to Reitzel and spoke to him about the cards. I have carefully studied Reitzel's testimony and find it is confused as to dates. I am convinced that Reitzel just did not remember

when Goddard told Reitzel Respondent was considering promoting him to sergeant. Foley asked Reitzel if he had gotten authorization cards, which Foley had given him, signed. Reitzel said he was working on them. In the latter part of June, Goddard phoned Reitzel and asked him to bring the signed pledge cards to Respondent's office. Reitzel failed to do so. About 10 o'clock that evening, Captain Kretzlow, a supervisor, came to Reitzel's home and asked for the signed AFG cards and Reitzel explained that he didn't have them with him. The next morning at work, Goddard came to Reitzel and picked up the AFG cards.[3]

When Respondent took over Wackenhut's operations, Reitzel was promoted from guard to sergeant with a raise from $1.75 to $1.95 an hour with no additional obligations. There is insufficient probative evidence that Reitzel was promised the promotion or was promoted to sergeant in violation of Section 8(a)(1) or (2) of the Act. Reitzel's recollection of when he was told he would be promoted to sergeant is too confused to permit a finding.

Respondent violated Section 8(a)(2) and (1) of the Act by New's direction to Reitzel to see Foley who as part of the hiring procedure told Reitzel he had to sign an AFG pledge card to work for Respondent and asked him to get other employees to sign for the AFG. Respondent similarly violated the Act by Goddard's request of Reitzel that he bring the signed AFG cards to Respondent's office and by Kretzlow's asking for the cards and by Goddard picking them up from Reitzel at work.

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[3]The record makes clear there were about 18.

2. Thomas C. Ware

Ware was employed by Wackenhut as a guard. In early June, he went to Respondent's office with a filled out application for employment by Respondent. He gave his application to New. He told New he would like to know about pay and about hospitalization and other details. New directed him to Foley for answers. He saw Foley in the same room. Foley gave him no answers. Foley repeatedly pushed an AFG authorization card in front of Ware and told him the Union was out and that he had to sign the AFG card or not work for Respondent. Ware said that "in California" he had 30 days to make up his mind.

I find Respondent violated Section 8(a)(2) and (1) of the Act by New's assisting Foley in his solicitation for the AFG, of Ware.

3. Charles A. Blankemeier

On June 28, Blankemeier received an application for employment. The next day he returned the application when he went to Respondent's office to pick up a uniform. He saw Goddard and Kretzlow and asked for his uniform. As he was preparing to leave with his new uniform, Goddard told him he had to sign an AFG authorization slip before he could have Respondent's uniform. He signed the AFG slip with Foley's name on it and left with the uniform.

I find Respondent violated Section 8(a)(2) and (1) of the Act by conditioning his receipt of Respondent's uniform, necessary for work with Respondent, on his signing an AFG authorization card.

4. Harris K. Camp

About June 10, Camp went to Respondent's office for an application. He saw Goddard. Goddard told him to go into the next room. Camp did so and found Foley to be the only one there. Foley told him Respondent now had the contract and if Camp wanted to work for Respondent he would have to sign the AFG card. Foley handed him a card and Camp said he would think it over. He left and again saw Goddard who gave him a work application. The next day Camp brought this application back to Goddard. He was measured for Respondent's uniform. A couple of weeks later, on June 30, he went in to pick up his uniform and on top of it was an AFG union slip that was supposed to be signed by him. In the presence of Goddard, Kretzlow gave him the AFG slip to sign. He said it had to be signed. It was in with the paper work for the clothing.

I find Respondent, through Goddard and Kretzlow, assisted the AFG in signing up Camp, in violation of Section 8(a)(2) and (1) of the Act.

5. Stanley L. Ganiewski

Ganiewski was a Wackenhut guard who went to Respondent's office for employment about June 10. He saw Goddard and asked where the applications were. Goddard pointed to a room. Ganiewski went there and found Foley there alone. Foley told him he'd have to join the AFG to work for Respondent. Foley spoke at length about the AFG and its contract. He asked Ganiewski to sign an AFG authorization card. The latter said he'd think about it and left.

I find Respondent, through Goddard, assisted the AFG in its solicitation of Ganiewski through Foley, in violation of Section 8(a)(2) and (1) of the Act.

6. Walter Drake

In the latter part of June, Drake went to Respondent's office and talked to Goddard and some captain. The captain brought to him an authorization card of the AFG and said he would have to sign it before he could go to work. He said it was for "their union." Drake said he had 30 days to sign the card. They said he would have to sign it before he could go to work. Later that day, Goddard told him he had 30 days to sign but Respondent would like to have the AFG authorization signed before he went to work. Drake signed the card.

Respondent, through Goddard and the captain, assisted the AFG in its organizing activities in connection with Drake and thereby violated Section 8(a)(2) and (1) of the Act.

C. *Respondent is a Successor to Wackenhut and Obligated to Bargain With the Union*

When Respondent began its operations at Lockheed during the certification year, and during the contract term, it performed the same operations at Lockheed as had Wackenhut. It has in its employ a majority of Wackenhut's former employees. There has been a substantial continuity of Wackenhut's business operations by Respondent. At least substantially the same business facilities have been used. The working conditions are substantially the same. The services provided are substantially the same. Respondent's taking over Wackenhut's operations at Lockheed constituted no change in

the "employing industry forming the appropriate bargaining unit for which the Union had been certified." *Maintenance, Incorporated,* 148 NLRB 1299. As in *Maintenance,* "Respondent commenced the performance of substantially the identical operations that had theretofore been performed by [Wackenhut], servicing the same facilities for the same customers in substantially the same manner and at the same work site, and utilizing for that purpose a former [Wackenhut] work force to perform the same functions and exercise the same skills."

Respondent had the duty to honor its employees' choice of a bargaining representative, the Union. This was a public obligation not arising from private contract. The Union "was entitled to statutory recognition at the time Respondent took over." *Maintenance, Incorporated, supra.*

It is clear "that Respondent assumed the obligation the Act imposes upon an employer to recognize and deal with its employees' majority representative when it selected as its work force the employees of the previous employer to perform the same tasks at the same place as they had in the past. These employees had already expressed their choice of bargaining representative, and continued to constitute an appropriate bargaining unit. As the certification year had not yet expired at the time the Union sought recognition and bargaining,[4] the presumption of the Union's continuing majority status applied and was not then vulnerable to attack." *Maintenance, Incorporated, supra.* Respondent was obligated to recognize and bargain with the Union as the statutory representative of its employees

[4]July 12.

in an appropriate unit. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to comply with the Union's July 12 demand for bargaining. It has been found that Respondent knew, when it bid for the Lockheed contract, that the Union was the certified bargaining representative.

Respondent challenges the appropriateness of the bargaining unit as applied to Wackenhut, and as applied to Respondent. While a broader unit might have been appropriate, I find a unit of guards limited to a single facility is an appropriate unit. Here the certification was pursuant to a consent election agreement. There is no evidence that the Regional Director was arbitrary or capricious. A mere change of employers does not destroy the certification.

D. *Respondent Violated Section 8(a)(2) and (1) By Recognizing the AFG*

As has heretofore been found, the AFG did not represent an uncoerced majority of Respondent's employees on or before July 1, when Respondent recognized the AFG. Consequently, Respondent assisted AFG in violation of Section 8(a)(2) and (1) of the Act when it recognized the AFG as bargaining representative.

E. *Respondent Violated Section 8(a)(5) and (1) of the Act By Not Honoring and Assuming and Doing Business Under the Contract Between the Union and Respondent's Predecessor, Wackenhut*

On April 29, the Union and Wackenhut entered into a collective-bargaining agreement covering Wackenhut's Lockheed employees, the contract to be effective until 1970.

While *Wiley v. Livingston*, 376 U.S. 543, dealt specifically only with the obligation of a successor employer to arbitrate under a contract with a union, the decision made clear that the rights of employees under a collective-bargaining agreement are not automatically terminated by the fact that one employer succeeds to the rights of another employer. The Court was concerned with whether, as here, the business remains the same. The Court recognized that employees do not ordinarily take part in negotiations, leading to changes in corporate ownership. The well being of employees is at best incidental to the negotiations. The Court held, "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." The Court emphasized that a collective-bargaining agreement is not an ordinary contract.

The Union persuasively argues that in an industry of the nature here involved where the employer may be changed from year to year, the union contract should follow the unit rather than the employer. The employees may select a union which obtains a contract for their benefit and find the employer changes. If the new employer may ignore the contract, all negotiations for peaceful contractual relations come to naught. Here, if Respondent does not assume and honor the contract, economic stability is destroyed. To leave Respondent free to bargain from scratch and ignore the common law of the employing industry is to leave an industry such as this to contracts of no substance or meaning.

The *Wiley* reasoning has been applied in a situation very similar to the instant case. *Wackenhut Corporation v. International Union, United Plant Guard Workers of America,* 332 F.2d 954 (C.A. 9). There the court found that where, as here, there is a "substantial similarity of operation and continuity of identity of the business enterprise before and after the change in ownership," the successor employer is bound by the entire contract of the predecessor.

I find that Respondent by refusing to honor the contract between Wackenhut and the Union, refused to bargain in violation of Section 8(a)(5) and (1) of the Act since on or about July 24.[5]

IV. The Effect of the Unfair Labor Practices

The activities of Respondent set forth in section III, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States, leading to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

Upon the foregoing findings of fact and the entire record in the case, I make the following conclusions of law:

1. Respondent and Wackenhut are employers engaged in commerce within the meaning of the Act.

2. AFG and the Union are labor organizations within the meaning of the Act.

3. All full-time and regular part-time employees of Respondent performing plant protection duties as determined in Section 9(b)(3) of the Act at Lockheed,

[5]Cf. *Michaud Bus Lines, Inc.*, 171 NLRB No. 21.

Ontario International Airport; excluding office clerical employees, professional employees, supervisors, and all other employees as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By failing and refusing on July 24, and thereafter, to recognize and bargain wth the Union as the exclusive bargaining representative of Respondent's employees in the above-described appropriate unit and by failing to honor and adopt and enforce the existing contract between Wackenhut and the Union, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. By assisting AFG in obtaining representation among its employees and by recognizing AFG as the exclusive bargaining representative of its employees at a time when AFG did not represent an uncoerced majority of Respondent's employees, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (2) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1), (2), and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent be ordered to withdraw and withhold recognition from AFG unless

and until that union is certified, in order to enable its employees to exercise their statutory rights free from the unfair labor practices engaged in by Respondent.

It has been found that the Union is the certified bargaining representative of Respondent's employees in an appropriate unit and requested recognition and bargaining, the same being unlawfully refused, I shall recommend that Respondent bargain, upon request, with the Union and, if any understanding is reached, embody such understanding in a signed agreement. It has further been found that there is in existence a contract between Respondent, as successor to Wackenhut, and the Union. I shall recommend that Respondent honor, adopt and enforce that contract. I shall also recommend that Respondent give retroactive effect to all the clauses of the contract and make whole, with 6 percent interest, employees for any losses suffered by reason of Respondent's refusal to adopt, honor and enforce the agreement.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record herein, it is recommended that Respondent, its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively, upon request, with the Union as the exclusive bargaining representative of its employees in the above-described unit.

(b) Refusing to adopt, honor and enforce its contract with the Union, as successor of Wackenhut.

(c) Assisting or recognizing AFG as the representative of its employees for the purposes of collective bar-

gaining, unless and until said labor organization shall have been certified as the exclusive bargaining representative of said employees in an appropriate unit.

(d) Interfering with representation of its employees through labor organizations of their own choosing.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to join or assist the Union or otherwise engage in activities protected by the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Withdraw and withhold recognition from AFG until or unless it is certified as bargaining representative of Respondent's employees in an appropriate unit.

(b) Bargain collectively, upon request, with the Union and, if any understanding is reached, embody such understanding in a signed agreement.

(c) Honor, adopt and enforce the contract between Respondent, as successor to Wackenhut, and the Union and give retroactive effect to all the clauses of said contract and, with interest of 6 percent, make whole its employees for any losses suffered by reason of Respondent's refusal to honor, adopt and enforce said contract.

(d) Post at its Lockheed, Ontario, California, operations copies of the notice attached hereto as "Appendix."[6] Copies of said notice, to be furnished by the

[6]In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

Regional Director for Region 31, shall after being signed by Respondent's authorized representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by any other material.

(e) Notify said Regional Director, in writing, within 20 days from the date of the receipt of this Recommended Order what steps Respondent has taken to comply herewith.[7]

Dated: June 4, 1968.

/s/ E. Don Wilson
E. Don Wilson
Trial Examiner

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[7]In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act (as Amended), we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively, upon request, with International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162 as the exclusive bargaining representative of our employees in the following appropriate unit:

> All our full-time and regular part-time employees performing plant protection duties as determined by Section 9(b)(3) of the National Labor Relations Act, at Lockheed, Ontario International Airport; excluding office clerical employees, supervisors, and all other employees as defined in the Act.

WE WILL NOT refuse to adopt, honor and enforce our contract, as successor of Wackenhut, with the above-named Union and covering the above-described unit.

WE WILL NOT assist or recognize American Federation of Guards, Local 1, as the representative of our employees for the purposes of collective bargaining, unless and until it shall have been certified as the exclusive bargaining representative of our employees in the above unit.

WE WILL NOT interfere with representation of our employees through labor organizations of their own choosing.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights to join or assist the United Plant Guard Workers or otherwise engage in activities protected by the Act.

WE WILL withdraw and withhold recognition from American Federation of Guards until or unless it is certified as bargaining representative of our employees in an appropriate unit.

WE WILL bargain, upon request, with United Plant Guard Workers and, if any understanding is reached, embody such understanding in a signed agreement.

WE WILL, as successor to Wackenhut, honor, adopt and enforce our collective-bargaining contract with United Plant Guard Workers and give retroactive effect to all clauses of said contract and, with interest at 6 percent, make whole our employees for any losses suffered by reason of our refusal to honor, adopt and enforce said contract.

THE WILLIAM J. BURNS
INTERNATIONAL DETECTIVE
AGENCY, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 10th Floor, Bartlett Building, 215 West Seventh Street, Los Angeles, California, 90014, Telephone No. 688-5850.

APPENDIX D.

Order Extending Time to File Petition for Writ of Certiorari.

Supreme Court of the United States, No. A-57, October Term, 1971.

Burns International Security Services, Inc., Petitioner v. National Labor Relations Board, et. al.

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IT ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 16, 1971.

/s/ John M. Harlan
Associate Justice of the Supreme
Court of the United States

Dated this 17th day of July, 1971.

APPENDIX E.

Statutes Involved.

Sections 8, 9 and 10 of the Labor Management Relations Act, 1947, as amended (hereinafter the "Act"), 29 U.S.C. Sections 158, 159 and 160 provide in relevant part:

"Sec. 8 (a) It shall be an unfair labor practice for an employer—.

". . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

". . .

"Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees . . .

". . .

"Sec. 10 (f) Any person aggrieved by a final order of the Board . . . may obtain a review of such order in any circuit court of appeals of the United States . . . wherein such person . . . transacts business . . . by filing . . . a written petition praying that the order of the Board be modified or set aside . . . the court shall . . . enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

Section 7 of the Administrative Procedure Act, 5 U.S.C. Section 557 (c) provides in relevant part:

> "All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—
>
> "(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . ."